IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

SATURDAY, THE 1ST DECEMBER 2007 / 10TH AGRAHAYANA 1929

Crl.Rev.Pet.No. 2589 of 2006()

CRA.280/2004 of SPL. COURT (NDPS ACT CASES), THODUPUZHA
CC.659/2001 of JUDL. MAGISTRATE OF FIRST CLASS COURT, ADIMALI

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REVN. PETITIONER: APPELLANT/ACCUSED

SHIBU JOSEPH, KAKKANADU VEEDU,
AYAVANA P.O., MUVATTUPUZHA.

BY ADV. SRI.UNNIKRISHNAN.V.ALAPATT

RESPONDENTS: COMPLAINANT & STATE

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1. K.S.ABDUL LATHEEF,
MANAGER, HOME SHINE APPLIANCES,
KOTHAMANGALAM.

2. STATE OF KERALA,
REP.BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.PEEYUS A.KOTTAM
PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 01/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P.No. 2589 of 2006

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Dated this the 1st day of December, 2007

ORDER

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C., the petitioner who was the accused in C.C. No. 659 of 2001 on the file of the J.F.C.M., challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the Revision Petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the Revision Petitioner re-iterated the contentions in support of the Revision. The courts below have concurrently held that the cheque in question was drawn by the revision petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the Revision Petitioner/accused failed to make the payment within

15 days of receipt of the statutory notice.

4. The learned counsel for the revision petitioner made the following further submissions before me in support of the revision.

5. The complaint was filed by the Manager of the complainant-firm and it is specifically alleged in the complaint that he has been authorised on behalf of the firm. But no such authorisation was filed along with the complaint. In fact, Ext.P7-Resolution of the firm dated 12.01.98 was produced only on 14.5.05. Whereas the complaint was filed as early as on 22.11.01. The person who filed the complaint styling himself as the Manager of the complaiant- firm was not competent to file the complaint. In the decision **Sudesh Kumar Sharma v. Selvamani** (1995(1) KLT S.N.14.Madras H.C., it is stated that if the complaint was filed by the Manager of the firm, then he should have the Power of Attorney. Here admittedly PW1 does not have any power of attorney, but only had an authorization, that too, produced long after the filing of the complaint. Again the Madras High Court has in **Muthukaruppan v.Raghavan**

(2006(2) KLT 996) held that even though the complaint can be signed by the power of attorney, the sworn statement can be given only by the complainant. Here the complaint has been filed by the Manager who is not even a power of attorney holder. Hence the sworn statement given by him as well as the evidence adduced by him cannot be looked into. Ext.P1 cheque dated 20.9.01 was presented before the drawee bank on 30.10.01. Ext.P4 statutory notice dated 12.10.01 is claimed to have been received by the accused on 15.10.01, but in Ext.P5 acknowledgment card the date of delivery as originally shown was 15.11.01 which has been corrected as 15.10.01. The documents produced by the accused will show that the accused had purchased a Television and its accessories and a Maharaja mixie altogether costing Rs.19,530/- and had paid a sum of Rs.10,000/- in cash on 7.2.01 and what remained to be paid was only Rs.9,530/- which was allowed to be paid in 6 installments. The specific defence taken by the accused is that at that time two signed blank cheques were taken from the accused and Ext.P1 is one of those cheques which has been misutilised by the

complainant to lay a false complaint against the accused. The accused had called upon the complainant to produce the day book and a perusal of page 81 of Ext.P4 day book produced by the complainant will show that the entries therein are by the same person in the same handwriting written up at a stretch evidently to include the alleged transaction covered by Ext.P1.

6. I am afraid that I cannot agree with the above submissions. It is true that the complaint has been filed by the Manager of the firm. In the complaint it is specifically pleaded that the Manager has been duly authorised as per a resolution dated 12.01.98 passed by the firm. A copy of the said resolution was produced along with the complaint. Ext.P7 is the authenticated copy of the said resolution dated 12.1.98 produced on 14.5.04. Ext.P7 is the original of the very same resolution a copy of which was produced along with the complaint. If so, as on 22.1.01 when the complaint was filed, PW1 the Manager had the necessary authorization to file the complaint and to conduct the case on behalf of the complainant firm. The two rulings of the Madras High Court had been considered by this Court in the

decision **Ashalatha vs. State of Kerala** (2007 (3) KLT 984) wherein it was held that it is not necessary for the payee or the holder in due course to personally file the complaint or give the sworn statement or examine before the Court as a witness on behalf of the complainant. When the complaint was filed by the Manager of the firm which had duly authorised him to do so as per Ext.P1, resolution a copy of which was produced along with complaint, it cannot be said that the Manager was incompetent to file the complaint.

7. The alleged correction in Ext.P5 acknowledgment card is also a contention which does not merit approval at the hands of this Court. Admittedly Ext.P4 notice dated 12.1.07 was sent by Registered post with acknowledgment due. Ext.P5 is the acknowledgment card in which the date of delivery is shown as 15.10.02. No doubt, in the figure "10" indicating the month there is some overwriting. But certainly it is not 15.11.02 as contented by the revision petitioner. This is because the postal seal on Ext.P5 acknowledgment card clearly shows that it was despatched in the month of October which is indicated by the

numeral “10”. In fact, after the signature of the addressee (the accused) Ext.P5 acknowledgment card has gone back to the complainant on 20.10.01 as indicated by the postal seal therein. Hence it cannot be said that there is correction of the date of delivery in Ext.P5 or that there is no evidence of service of the statutory notice, for the purpose of reckoning whether the complaint was filed in time or not.

8. The contention based on Ext.D1 to D4 is equally misconceived. The trial court was not inclined to accept the defence version that Ext.P1 cheque was one of the two signed cheques allegedly given by the accused when he was given an installment facility regarding the balance amount of Rs.9,530/-. ExtD1 is the bill dated 7.2.01. Ext.D1 transaction does not relate to the transaction which was the subject matter of Ext.P1. Cheque dated 20.9.01. The courts below also were not inclined to accept the revision petitioner's contention that Ext.P4 day book was written up for the purpose of this case. It is pertinent to notice that the revision petitioner who came to the court with a definite defence did not even mount the witness box nor did

he give evidence in support of the case. There is no dispute regarding the signature in Ext.P1 cheque and the courts below have accepted the complainant's version regarding the circumstances under which it was issued and have disbelieved the revision petitioners case in that regard.

9. Both the courts below have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

10. What now survives for consideration is the question as to whether adequacy or otherwise of the evidence imposed on the revision petitioner. As per the modified sentence passed by the lower appellate court, the revision petitioner has to undergo imprisonment till the rising of the court and to pay an amount of Rs.19,000/- as compensation under Section 357(3) Cr.P.C. and on default to pay the sum, he is directed to undergo simple

imprisonment for one month. Pursuant to the interim orders passed by the lower appellate court as well as this Court, the revision petitioner has deposited the entire cheque amount of Rs.19,000/- before the trial court. The sentence imposed on the revision petitioner is modified into one of fine only. The said amount of Rs.19,000/- deposited before the trial court shall constitute the fine. The 1st respondent - complainant shall be permitted to withdraw the said amount.

This revision is disposed of confirming the conviction but modifying the sentence as above.

sd/-

V. RAMKUMAR, JUDGE

sj

/True Copy/

P.A To Judge